JD–46–05
Sandusky, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GENERAL FABRICATIONS CORPORATION	Cases 8–CA–29443
	8–CA–29444
and	8–CA–29445
	8–CA–29446
SHEET METAL WORKERS INTERNATIONAL	8–CA–29507
ASSOCIATION, LOCAL UNION NO. 33, OF	8–CA–29520
NORTHERN OHIO, AFL–CIO	8–CA–29591
	8–CA–29728
	8–CA–29756
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	8–CA–31000
GENERAL FABRICATIONS CORPORATION	
and	8–CA–33125
	8–CA–-34879
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 33, OF NORTHERN OHIO, AFL–CIO	

Paul C. Lund, Esq., for the General Counsel.
Timothy C. McCarthy, Esq. (Shumaker, Loop & Kendrick, LLP), of Toledo, Ohio, for the Respondent.

SUPPLEMENTAL DECISION

EARL E. SHAMWELL JR., Administrative Law Judge: This case was tried in Cleveland, Ohio, on March 7 and 8, 2005, based on a compliance (backpay) specification and notice of hearing issued by the Regional Director of Region 8 of the National Labor Relations Board (Board) on January 9, 2004, and amended on January 5, 2005, and at the hearing.

On August 5, 1999, the Board issued its Decision and Order in *General Fabrications Corp.*, 328 NLRB 1114 (1999); this decision was enforced by the Sixth Circuit Court of Appeals (222 F.3d 218 (2000)) on August 1, 2000. The underlying Board proceeding involved the unlawful discharge or layoff of six employees—Davin Jones, Ed Collins, James Roberts, Bryan Cloud, John Johnson, and Ron Fields. General Fabrications Corp., the Respondent, offered Jones and Johnson reinstatement, and both declined. Fields was recalled to work by the Respondent but no longer is employed by the Company. The Respondent has not offered reinstatement to Collins, Roberts, or Cloud.[1]

[1] Because no valid offers of reinstatement have been made to these three, their rights are reserved until such time as the Respondent makes an unconditional offer of reinstatement.

The supplemental hearing was convened to determine the amount of backpay owed the discriminatees from the date of unlawful discrimination through the fourth quarter of 2004.

At the beginning of the hearing on March 7, the General Counsel moved to strike portions of the Respondent's answer and for partial summary judgment.[2] I declined to rule then on this motion because the Respondent objected that it had not been given prior notice; the motion was held in abeyance pending the Respondent's answer to be included in its posthearing brief.

Discussion of the Motion to Strike and Partial Summary Judgment

In support of his motion, the General Counsel cites the following provisions of the Board's Rules and Regulations, Section 102.56 (in pertinent part):

> (b) *Contents of answer to specification*.—The answer shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent is without knowledge, in which case the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification at issue. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer shall specifically state the basis for such disagreement, setting forth in detail the respondent's position as to the applicable premises and furnishing the appropriate supporting figures.
>
> (c) *Effect of failure to answer or to plead specifically and in detail to backpay allegations of specifications*.—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting the allegation.

The General Counsel contends that the Respondent's answer to the amended specification in pertinent part constitutes nothing more than a general denial and should be stricken because the matters in question are within the knowledge of the respondent and include the various factors entering into the computation of gross pay. In addition, to the extent the Respondent has disputed in its answer the accuracy of the figures or the premises on which they are based, it has not specifically stated the basis for disagreement and provided a detailed position with supporting figures.

[2] See G.C. Exh. 3.

The General Counsel notes that in paragraph 2(a) of its answer to the amended specification,[3] the Respondent first asserts a general denial to appropriateness of the specification's measurement of gross pay due Jones. The Respondent avers in paragraph 2(a) that the measurement is inappropriate because Jones had not been employed long enough to establish a reliable record of average earnings and business conditions had changed during the backpay period. The Respondent submits that the appropriate measure of gross backpay due Jones should be based on the earnings of any replacement or comparable employees during the backpay period; working a 40-hour workweek (with no overtime) and based on average annual wage increases of not more than 2.8 percent. The Respondent further contends that any net backpay amount should be further reduced by additional interim earnings not contained in the specification.

The General Counsel contends that the Respondent did not identify any comparable employees, the amount of any raise, or any premise upon which it is based in its answer.

Regarding paragraph 2(e), the Respondent again denies in its answer the appropriateness of the gross pay formula set out in the specification for Johnson. The Respondent's answer states that Johnson had not been employed long enough to establish a reliable record of average earnings and asserts that the gross pay should be based on earnings of comparable employees during the backpay period working a 40-hour week, without overtime.[4]

Regarding paragraph 2(f), the Respondent's answer denies the specification's gross backpay due Fields, again asserting that he had not been employed long enough to establish a reliable record of average earnings. Here, too, according to the Respondent's answer, Fields should have his gross backpay determined by reference to comparable employees working a 40-hour week without overtime.[5]

The General Counsel also notes that in paragraph 2(b), 2(c), 2(d), and paragraphs 8 and 11, the Respondent avers that Collins, Roberts, and Cloud are not entitled to backpay because there was no work available to them during the backpay period that they were qualified to perform.

The General Counsel contends these averments do not comport with the aforementioned Board Rules and Regulations which require the Respondent to set forth in detail the applicable premises on which it is relying and furnish appropriate supporting figures. He submits that a respondent is not entitled simply to criticize the specification; nor may it attempt to relitigate the underlying proceeding by asserting no backpay is due because the discriminatees' jobs were eliminated, the presumption being in the case of illegal discharges or layoffs that some backpay is due.

The Respondent counters *that at the hearing* it introduced "extensive" evidence regarding the actual hours worked by employees in the job classifications in which the discriminatees arguably would have been employed during the backpay period covering 1998

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[3] See G.C. Exh. 1(r).

[4] Based on the Respondent's assessment, Johnson's gross pay amount would be $13,025 as opposed to the $15,249 called for by the specification.

[5] The Respondent claims that Field's gross backpay should be $4,560 as opposed to $5,009 called for by the specification.

through 2004.[6] The Respondent contends that based on these figures, the backpay amounts owed all claimants should be proportionately reduced to reflect the lesser number of hours worked by comparable employees during the backpay period.

The Respondent also contends that the specification uses an inappropriate measure for annual wage increases over the backpay period. The Respondent submits that its evidence adduced at the hearing established that there were no wage increases in 2001 and 2003. I note that these records reflect wages increases of 5 percent in 1998 and 1999; 3 percent in 2000 and 2002; and 2 percent in 2004.[7]

Regarding its contention that there was no work available for Collins and Roberts, the Respondent argues that the specification makes the erroneous assumption that Collins and Roberts could have been employed as welder/fabricators. According to the Respondent, the specification also makes the erroneous assumption that Cloud was employed as an electrician. In the case of each employee, the Respondent argues that they were simply not qualified to hold these positions during the backpay period.

I will grant the General Counsel's motion in part and deny it in part.

First in agreement with the General Counsel, the Board Rules and Regulations require the answer to the specification to be clearly stated and supported by figures and other computations where the employer takes issue with the proposed specification. Here, the Respondent did not include in its answer the supporting data it later introduced at the hearing. Clearly, this information and supporting data were available to the Respondent, and it offered no reason for not including the data in its answer.

The Respondent's answer in paragraphs 2(a), 2(e), and 2(f) asserting that Jones, Johnson, and Fields should have their gross pay determined by reference to comparable employees is hereby stricken for failure to comply with Section 102.56(b). Accordingly, I would find and conclude that the gross pay due discriminatees Jones, Johnson, and Fields as determined by the specification are true. *Paolicelli*, 335 NLRB 881, 882–883 (2001).

Regarding the Respondent's claim that the specification is erroneous in the computation of the wage increases for all claimants, I would, in likewise strike this response and the supporting data to the extent it is part of the Respondent's answer to the specification. Here, too, this information was only adduced at the hearing but, in my view, was certainly available to the Respondent long before. The Respondent offered no explanation for its not including this data in its answer as required by the aforementioned rule governing responses to backpay specifications. Accordingly, where the specification addresses the annual wage increases for each claimant, I would find and conclude that the amount determined is true.

I will deny the General Counsel's motion to strike regarding the Respondent's claim in its answer that Johnson, Fields, and Jones had not worked long enough to establish a reliable

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[6] In R. Exhs. 8 through 14, the Respondent adduced work hour summaries for welder/fabricators and electricians in its employ, along with payroll summaries for each employee broken down by quarters for 1998 through 2004. The Respondent attached to its brief Appendix A, purporting to show yearly averages of hours worked for welder/fabricators and electricians.

[7] See. R. Exh. 15.

work record and that Collins, Roberts, and Cloud were entitled to no backpay because there was no work available to them during the backpay period for which they were qualified.

Here, in contradistinction to the matters discussed above, these claims, in my view, are more in the nature of defenses as opposed to the type of data—figures—one would used to counter the specification that the Board Rule purports to address. Leaving to later discussion their legal efficacy, these assertions, in my view, are not capable of reductions to concrete specification as are the data such as overtime hours and wage increases. Significantly, the Respondent's claims are couched in the negative—the claimants have *not* worked long enough and are *not* entitled to backpay because *no* work was available to them because they were *not* qualified. Accordingly, in my view, the Respondent's answer was sufficient to give the General Counsel notice of its position regarding the appropriateness of the specification on these grounds. As I see the matter, these claims furthermore could only be asserted and maintained through the testimony and perhaps other supportive evidence garnered at a Board hearing. Therefore, I would deny the General Counsel's motion in this respect.[8]

Legal Principles Applicable to Backpay Proceedings

It is well established that when loss of employment is caused by a violation of the Act, a finding by the Board that an unfair labor practice was committed is presumptive proof that some backpay is owed. *NLRB v. Mastro Plastics Corp.*, 145 NLRB 1710 (1964) enfd. 354 F.2d 170 (2nd Cir. 1965), cert. denied 384 U.S. 972 (1965). *La Favorita, Inc.*, 313 NLRB 902 (1994), enfd. 48 F.3d 1232 (10th Cir. 1995).

The General Counsel's burden is to demonstrate the gross amount of pay due, that is, what amount the employee would have received but for the employer's illegal conduct. The General Counsel, in demonstrating gross amounts owed, need not show an exact amount, *Virginia Electric and Power Co. v. NLRB*, 319 U.S. 533 (1943); an approximate amount is sufficient. *Laborers Local 158 (Worthy Bros.)*, 301 NLRB 35 (1991). Thus, it is well established that any formula which approximates what the discriminatee would have earned absent the discrimination is acceptable if it is not unreasonable or arbitrary under the circumstances. *Am Del Co., Inc.*, 234 NLRB 1040 (1978). *Frank Mascali Construction*, 289 NLRB 1155 (1988). The Court and the Board have held that any doubts and uncertainties regarding the resolution of the backpay issue must be resolved in the favor of the discriminatee and against the wrongdoing employer. *United Aircraft Corp.*, 204 NLRB 1068 (1973).

Once this has been established, the employer must then demonstrate facts that would mitigate the claimed backpay liability. The employer must, by a preponderance of the evidence, establish and clarify any such uncertainties. *Metcalf Excavating*, 282 NLRB 92 (1986).

A respondent may do this by showing that employees laid off for unlawful reasons would have been laid off for lawful reasons at a later date. *So-White Freight Lines*, 301 NLRB 223 (1991), enfd. 969 F.2d 401 (7th Cir. 1992). However, "the burden [is] on [the Respondent] to

[8] The Board has noted that in certain instances, a general denial is sufficient under the Board's Rules to warrant a hearing because the information is not or may not be within the Respondent's knowledge. The issue of interim earnings is one such instance. See *Aroostook County Regional Ophthalmology Center*, 332 NLRB 1616 (2001). Under the circumstances present in the instant case, the claims of the Respondent were not based on evidence solely in the Respondent's knowledge but also the testimony of witnesses at the hearing, and presented a factual dispute sufficient to deny the motion for summary judgment in my view.

prove with certainty, when the discriminatees would have been laid off, absent discrimination." *Fruin-Colnon Corp.*, 244 NLRB 510, 512 (1979). A respondent cannot succeed in closing the backpay period based on mere speculation that the discriminatee would have been subsequently laid off for legitimate reasons. *F & W Oldsmobile*, 272 NLRB 1150, 1151 (1984).

As a general proposition, any formula which approximates what discriminatees would have earned had they not been discriminated against is acceptable if it is not unreasonable or arbitrary in the circumstances. Id. *La Favorita, Inc.*

Notably, where awards may only be close approximations, the Board may adopt formulas reasonably designed to produce such approximations. *NLRB v. Carpenters Local 180*, 176 NLRB 927 (1969) enfd. 433 F.2d 934 (9th Cir. 1970); *Velocity Express, Inc.*, 342 NLRB No. 87 (Aug. 31, 2004).

The Board has determined that an acceptable methodology for determining backpay is the pre-unfair labor practice earnings method. *Weldun International, Inc.*, 340 NLRB No. 79 (Sept. 30, 2003). Generally, the pre-unfair labor practice earnings method is applied to short time periods where it can be assumed that there has been little change that would affect the accuracy of the backpay calculation. However, a longer period of backpay does not prevent the General Counsel from applying the pre-unfair labor practice method of calculation. The Board held in *Weldun International*, that the pre-unfair labor practice method may be a reasonable and accurate approximation of the earnings the discriminatees would have realized over a 5-year period had they not been unlawful discharged.

Although the pre-unfair labor practice earnings method may be appropriate, major changes in the business, such as deregulation of an industry or a decline in the employer's work force for a valid reason, may render the use of such a formula unreliable. *Woodline Motor Freight*, 305 NLRB 6 (1991); *Boland Marine and Mfg. Co.*, 280 NLRB 454, 460–461 (1986). Nonetheless, major changes are not sufficient to prevent recovery if those changes were the result of an unfair labor practice. "The Board does not reduce a backpay award based on a reduction in work that is, itself, the result of antiunion animus." *Weldun International*, supra.

As a general proposition, any wages or earnings received by the discriminatee from interim employment are deducted from the gross pay. Strike benefits received by the discriminatees from a union can constitute wages or earnings resulting from interim employment and are properly deducted from gross pay. However, if these sums represent collateral benefits flowing from the association of the discriminatees with their union, then these sums are not deductible. The burden of proving that strike benefits constituted wages for picketing or other activities and thus were in the nature of interim earnings falls on the Respondent. *ABC Automotive Products Corp.*, 319 NLRB 874 (1995), citing *Rice Lake Creamery Co.*, 151 NLRB 1113, 1131 (1965), enfd. as modified 365 F.2d 888, 893 (D.C. Cir. 1966).

Although there is a presumption that backpay is owed, backpay claimants are under a duty to mitigate their losses. *Aneco, Inc.*, 333 NLRB 691 (2001). A discriminatee is entitled to backpay if he makes a reasonably diligent effort to obtain substantial equivalent employment following an unlawful discharge. *Moran Printing, Inc.*, 330 NLRB 376 (1999). The discriminatee must seek interim employment substantially equivalent to the position of which he was unlawfully deprived and that employment must be suitable to a person of similar background and experience. However, a discriminatee need only follow his regular method of obtaining work. *Ferguson Electric Co.*, 330 NLRB 514 (2000).

A backpay claimant is not held to the highest standard of diligence in seeking interim employment, but is only required to have made reasonable exertions. Thus, an employer does not satisfy its burden by showing that no mitigation took place because the claimant was unsuccessful in obtaining interim employment. *Aneco, Inc.*, 333 NLRB 691 (2001).

In *Lundy Packing Co.*, 286 NLRB 141, 142 (1987) enfd. 856 F.2d 627 (4th Cir. 1988), the Board reviewed the factors which the Board finds relevant to the determination whether a discriminatee's job search, and thus his mitigation effort, has been reasonable:

> It is well settled that the reasonableness of a discriminatee's efforts to find a job and thereby mitigate loss of income resulting from an unlawful discharge need not comport with the highest standard of diligence, i.e., he or she need not exhaust all possible job leads. Rather, it is sufficient that the discriminatee make a good-faith effort. In determining the reasonableness of this effort, the discriminatee's skills, experience, qualifications, age, and labor conditions in the area are factors to be considered. The existence of job opportunities by no means compels an inference that the discriminatees would have been hired if they had applied. The respondent's obligation to satisfy its affirmative defense is to show a "clearly unjustifiable refusal to take desirable new employment." Uncertainty in such evidence is resolved against the respondent as the wrongdoer. [Citations omitted.]

Finally, the Board will not penalize the discriminatee for poor recordkeeping. Failure to maintain a record of every place applied to for employment will not disqualify a discriminatee from receiving backpay. In determining whether an individual claimant made a reasonable search, the Board looks to whether the record as a whole establishes that the employee has diligently sought other employment during the entire backpay period. *Black Magic Resources*, 317 NLRB 721 (1995); *Saginaw Aggregates*, 198 NLRB 598 (1972).

I. The General Counsel's Compliance Specification[9]

The compliance specification sets forth the backpay period for the discriminatees as follows:

Discriminatee	Backpay Period Commences	Backpay Period Ends
Davin Jones	October 30, 1997	April 17, 2001
Ed Collins	November 3, 1997	Untolled
James Roberts	November 3, 1997	Untolled
Bryan Cloud	November 4, 1997	Untolled
John Johnson	November 4, 1997	June 25, 1998
Ron Fields	December 2, 1997	February 23, 1998

The specification states that an appropriate measure of the gross backpay due the discriminatees is the amount of earnings straight and overtime they would have received in each calendar quarter of their respective backpay periods but for the discrimination by the Respondent. The specification includes the following gross pay amounts in Exhibits A through

[9] The compliance specification (as amended) is contained in G.C. Exh. 1(n). The specific numbers used in these calculations are from Exhibits A through E, quarterly backpay reports dated 5–Jan–05, and may be updated to reflect the current amounts due.

F attached to the specification for each of the discriminatees using their pre-unfair labor practice wage rates as a basis:[10]

Davin Jones	$112,029
Eddie Collins	$203,239
James Roberts	$182,740
Bryan Cloud	$135,485
John Johnson	$15,249
Ronald Fields	$5010

The specification states that gross quarterly interim earnings (including straight and overtime) are the amount of earnings the discriminatees received from other employers during the backpay period, computed quarterly as set out in Exhibits A through F. The gross interim earnings in toto for each man are as follows:

Davin Jones	$95,043
Eddie Collins	$89,556
James Roberts	$99,926
Bryan Cloud	$158,376
John Johnson	$14,721
Ronald Fields	-0-

The specification states that quarterly expenses are those of a nonmedical nature incurred by the discriminatees as a direct result of the Respondent's unlawful acts against them. The quarterly net interim earnings are the difference between gross quarterly interim earnings and quarterly interim expenses. The net interim earnings in toto for each discriminatee are as follows according to the specification:

Davin Jones	$91,973
Eddie Collins	$85,159
James Roberts	$99,926
Bryan Cloud	$151,266
John Johnson	$10,312
Ronald Fields	-0-

The specification states that calendar quarter net backpay is the difference between calendar quarters gross backpay and calendar quarter net interim earnings. The net backpay in toto owed to each discriminatee according to the specification is as follows:

Davin Jones	$20,056
Eddie Collins	$122,686
James Roberts	$91,133
Bryan Cloud	$29,916
John Johnson	$4,937
Ronald Fields	$5,010

[10] The amounts also include annual wage increases each man would have received but for his unlawful discharge. The specification thus includes a yearly increase of 50 cents per hour throughout the backpay period for each man except Fields.

The specification also included reimbursement for medical insurance premiums for the replacement coverage obtained by the discriminatees during the backpay period[11] and for medical expenses to the extent that they would have been compensated (or reimbursed) for such expenses under the Respondent's medical insurance, less amounts paid by any other medical policy under which they had coverage.

The amounts as determined by the specification owed to each discriminatee for medical insurance premiums replacement coverage and medical expenses in toto are as follows:

Davin Jones	$ 0-
Eddie Collins	$1,271
James Roberts	$1,409
Bryan Cloud	$1,890
John Johnson	-0-
Ronald Fields	-0-

In summary, the specification states that the discriminatees are owed the following amounts including interest and the Respondent's share of FICA contributions.[12]

Davin Jones	$27,765
Eddie Collins	$146,955
James Roberts	$113,958
Bryan Cloud	$36,476
John Johnson	$7,308
Ronald Fields	$7,391

II. The Respondent's Opposition to the Backpay Specification

The Respondent takes issue with several aspects of the compliance specification. Specifically, it objects to backpay being awarded at all, the method used to calculate the backpay, wages, increases, overtime awarded, the calculation of interim pay, and the discriminatees' duty to mitigate their damages by seeking other employment.

III. The General Counsel's Rationale for the Backpay Specification

The General Counsel called Mary Bednar, a field examiner employed by the Board to handle compliance matters, as one of its principal witnesses.[13]

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[11] It is undisputed that during the backpay period the Respondent maintained medical insurance for its employees.

[12] The specification notes that the backpay amounts were calculated through December 31, 2004, for Collins, Roberts, and Cloud and continues to accrue until valid offers of reinstatement are made to the discriminatees. As of the hearing, no offers had been made to these men. The specification also notes that interest has been calculated through December 31, 2004, and continues to accrue until payment has been made.

[13] Bednar has been employed in the field of compliance since the late 1980's. She worked in the position of compliance officer from November 1991 through May 1996, when she voluntarily stepped down. She has since then worked in the compliance field on and off as needed.

Bednar stated that she prepared the backpay specification (as amended) for the six discriminatees. In arriving at the specification, Bednar considered the length of the backpay award, the documents she had in her possession regarding the discriminatees, and the average hours of regular and overtime worked, as well as the high turnover rate at General Fabrications. She further considered that General Fabrications had no specific wage policy. She evaluated their hire dates with the Company as well as the claims submitted by the discriminatees. It was based on her investigation of these sources that Bednar said she prepared the instant backpay specification.

Bednar stated that she applied the pre-unfair labor practice earnings formula in this case. She testified that this method of calculation is usually used for short calculation periods, where one can be reasonably certain there have been no changes in the working environment. However, given the particular circumstances in this case, she determined it was the appropriate method to apply. She applied this method to all the discriminatees, including ones with longer calculation periods. Bednar said that she determined that the pre-unfair labor practice earnings method was the most reliable and accurate methodology.

She stated she could not use equivalent or replacement employees' earnings in her calculations for two reasons. First, there was a high turnover rate at the Company and so there were no equivalent employees. She also testified that there was likely to be a disparity between the number of hours of regular work and overtime available to a senior worker and the number of hours of regular and overtime work available to a newer employees.

Second, Bednar said that she did not have the records for wages and hours of replacement workers. Bednar determined, based on the combination of these factors, that using the method based on the average hours worked by the discriminatees prior to the unfair labor practice was the most accurate and feasible method possible, given the circumstances. She made the following specific explanations for the discriminatees.

According to Bednar, both Fields and Johnson had short periods of backpay and so the standard method for calculating shorter periods of backpay based on pre-unfair labor practice earnings was highly appropriate for them.

In Jones' claim for backpay, Bednar reasoned that because he found other employment, applying the pre-unfair labor practice method in his case resulted in no over calculation except perhaps for one quarter in 1999.

Bednar admitted that Cloud had a long backpay period. However, by December of 1999, she noted that Cloud was earning far more than the backpay amount would cover in the specification damages for that month. She notes that effectively, his backpay damages amount to a 24-month period.

Bednar stated that for much of the time she was attempting to work up a specification for Roberts, his file could not be found at all. However, because Roberts and Collins had similar types of employment and worked side by side at the Company as welders/fabricators, Bednar said that she used Collin's file in calculating both Collins' and Roberts' backpay. Once Robert's file was found, Bednar said that she determined there was no detriment to the Respondent in using her selected method because it appears that Roberts' payments would have been higher due to more hours of overtime worked. She again noted that even though both of these employees had longer backpay claims, she determined, given the extant circumstances involving their claims—that is, no set wage increases, a high employee turnover, and a lack of

data—that the pre-unfair labor practice method was, nonetheless, the most accurate and fair method to arrive at a reasonable backpay amount for Roberts and Collins.

To determine the quarterly base backpay award, Bednar said that she determined the average number of hours per week that each discriminatee had worked for the Respondent. She multiplied that number by the average wage the employee would have receive during that quarter and multiplied that by the 13 weeks in each quarter.

To determine quarterly overtime pay, Bednar said that she looked at the average weekly overtime hours' experiences of each discriminatee and multiplied that by the overtime rate of pay (1.5 multiplied by the wage) and multiplied by the 13 weeks in each quarter.

To determine the appropriate wage increase for each claimant, Bednar noted that the Company had no policy setting out standard wage increases and so she looked at the average pay increases of the discriminatees. She found that Collins had received a $1.50 hourly increase in his first year, plus an additional $1 hourly increase for being leadman. Roberts had not yet been employed for a year but received a $1 increase; other discriminatees received a $1 hourly increase, a 50-cent hourly increase, or a 33-cent hourly increase. Bednar said that she also considered that fact that it did not appear to her that the rates of hired employees were entirely unrelated to their amount of experience. Furthermore, Bednar said that she again took into consideration the high turnover rate at the Company. Based on all these factors, Bednar determined that Collins' average 50-cent hourly increase a year (the lower average of the group) was the most reasonable approximation and, accordingly, applied this lower amount to all the discriminatees. Consistent with her determination that the average yearly increase was 50 cents hourly, Bednar applied the 50-cent per hour increase to each discriminatee on the anniversary of his last pay increase; if he had not yet received a pay increase, then on the anniversary of his hire date.

Regarding interim payments, Bednar testified that she did not deduct two types of interim payments from the backpay calculation. The first was unemployment payments, which are not normally deducted from backpay claims. The second interim payment not deducted was union strike fund payments.

Bednar said that she investigated the situation and determined that the discriminatees were not required to perform a service (such as walk a picket line) in order to receive the payments from the union strike fund, and therefore did not have an employer-employee relationship with the Union. Accordingly, Bednar did not include the payments from the Union in the interim payments deducted from backpay.

In attempting to calculate expense deductions, Bednar said that she asked the discriminatees to submit their expense claims. Bednar said that she evaluated these claims and excluded claims that were not supported by a document or bill (such as undocumented insurance claims). Bednar decided that there were two relevant deductions she would allow. The first was mileage.

According to Bednar, some of the discriminatees worked at union jobs that were fairly far from their homes. To determine the mileage, Bednar said that she calculated the difference between the distance from the discriminatees' home to the General Fabrications plant and the distance from the discriminatees' home to the interim jobsite. Bednar stated that she employed Internet sites Mapquest or Expedia.com to determine the mileage. She then used the government mileage rate in the appropriate quarters to determine this expense. In the case where the two discriminatees rode in the same vehicle to a jobsite, she split the mileage cost

between them. Bednar noted that where she found that the mileage was not clear, she did not include it as an expense.

The second expense she allowed to be deducted was union initiation fees and dues.

Bednar stated that she included in her specification medical claims that were supported with documentation. She testified that several of the discriminatees included medical claims that were not documented. While understanding that much time had passed and records could be lost, Bednar excluded these from the calculations.

Additionally, she noted that some of Roberts' claims were excluded because his Board file had been misplaced. Bednar stated that this file was eventually found but, in her view, to include the amounts claimed would have been unfair and prejudicial to the Respondent. Bednar said that she also excluded Collins' $90,000 in documented medical bills that were discharged in bankruptcy.

Regarding the discriminatees' mitigation efforts, Bednar said that she evaluated their documentation and determined that the discriminatees had indeed made a reasonable effort to mitigate their damages. She noted that the formal reports of the discriminatees' attempts to mitigate their unemployment go through 2000 or 2002. Bednar stated that the discriminatees had run out of report forms. Bednar further testified that a discriminatee's failure to use the form is not, in her experience, counted against the discriminatee's duty to mitigate. Bednar testified that the discriminatees were interviewed about their mitigation efforts and that she felt that she had the necessary information to conclude that the discriminatees made a reasonable effort to mitigate their damages.

Bednar noted that in her experience, the form itself has never been mandated as the only means of providing information with regard to the discriminatees' obligation to search for work. Furthermore, she notes that for the most part, during the period in question, most of the discriminatees were gainfully employed. Therefore, where there were significant stretches of time when they were not searching for work, they were working gainfully. Bednar further testified that this case is consistent with other cases in terms of the completeness and "guestimates" of gross weekly pay.

In making her calculations, Bednar stated that she considered whether there was a period of time when any of the discriminatees could not have worked or was deliberately idle. Where this was determined, Bednar testified that she excluded any applicable time from her backpay calculation. For example, Cloud took 2 weeks of unpaid leave at some point. However, according to General Fabrications' handbook, he would only have been entitled to 1 week. Therefore, she reduced the number of weeks of backpay owed in that quarter from 13 to 12.

The General Counsel called discriminatees Cloud, Collins, and Roberts to testify.

Cloud testified that as far as he was concerned, he was hired by the Respondent as an electrician[14] whose primary duty while employed there was to build electrical control panels,

[14] Cloud said that he worked with discriminatees John Johnson and Ron Fields who, to him, were also electricians; they, along with employee Thomas Searcy, were employed in the same position and all did the same type of work. Cloud denied that he was employed as an electrician's helper or assistant.

which he worked on by himself. Cloud said that he not only did electrical work in the plant but was assigned to work at two offsite projects where he and a coworker installed electrical systems. Cloud stated that after his separation from the Respondent, the Sheet Metal Workers Union, Local 33, helped him join an electricians' union and he later obtained employment at a union contractor where he installed residential and commercial wiring. Cloud stated he is currently employed with the Norfolk Southern Railroad, repairing and maintaining electrical panels used in locomotives work that he said was very similar, if not completely identical, to the job he performed at the Respondent. Cloud said he started at Norfolk Southern around December 14, 1998.

Directed to his post-discharge activities, Cloud could not recall whether he received any strike benefits from Local 33 but may have. Cloud, however, recalled that the Board agents advised him of his duty to update his employment status. Cloud also noted that after his discharge from the Respondent, he and John Johnson worked for a time at the same employer in Sandusky, Ohio, and shared rides to the jobsite; Cloud drove and picked up Johnson at his residence and then took him home at day's end.

Cloud stated that he believed that he paid union dues during the fourth quarter of 1997 and 1998; Cloud initially paid dues to Local 33 and then later to an electricians union. Cloud said that he did not pay union dues while he was employed by the Respondent.

Cloud stated that he was aware that Local 33 set up a picket line at General Fabrications and he, in fact, joined the line. Cloud said a situation never arose testing whether he would cross the picket to work at the Respondent.

Collins stated that when he applied for work at the Respondent around December 1996, he answered an ad seeking a welder/fabricator for which position Collin said he was qualified. However, according to Collins, because he was out of work and needed a job, he submitted his application indicating that the position he desired was a laborer. Collins explained that he does this to let the prospective employer know he is willing to take any job available. However, when he applied for the welder/fabricator ad, he listed his having been trained in welding at Airco Technical Institute.[15] Collins said that when he applied he provided the Company copies of a Herron Testing Laboratories certificate of training and qualifications as a welder;[16] his completion of a 60-hour paper welding course in 1991;[17] and his certificate from Airco Technical certifying that he had completed various courses of instruction in different types of welding in October 1985.[18]

Collins said that he performed welding duties at General Fabrications, basically fabricating wash tanks initially and then primarily fabricating oven panels. Collins noted that he worked with discriminatee James Roberts in this capacity and later was made a leadman in the oven panels fabrication area.

Collins stated that the fabrication of oven panels entails taking information from blueprints, measuring and cutting the metal sheets, and then welding the panels utilizing welding equipment that the operator must carefully set up so as to avoid burning holes in the

[15] Collins' application of December 4, 1996, is contained G.C. Exh. 7. He lists as part of his education Airco Tech, and that he had graduated.

[16] See G.C. Exh. 8(a).

[17] See G.C. Exh. 8(b).

[18] See G.C. 8(c).

panels. Collins said that Roberts and he worked side by side and basically did the same work on the panels. As leadman, Collins said that he was not only responsible for fabricating the panels but also the associated paperwork.

Collins stated that he had medical insurance coverage while employed at General Fabrications. However, after he was terminated, he did not have coverage. Collins said that he developed a heart condition shortly after leaving the Company that required a surgical procedure which ultimately cost around $90,000. However, Collins said he was unable to pay the bill and sought bankruptcy protection. This debt was later discharged in bankruptcy.

Collins acknowledged that shortly after leaving the Company, he received for a time weekly strike benefits from Local 33; he did not receive benefits when he was hospitalized for the heart condition. Collins said that the Union never told him he had to picket to get paid, so he thought the payments were simply part of being on strike. Collins, while not sure, recalled that the Union sent him out for work after he was discharged but cannot recall the dates he worked at a company (Kirk and Blohm) where he performed welding duties.

Collins stated that he is currently employed at an Ohio educational center as a custodian.

Collins stated that if the situation arose, he would have crossed the picket line set up shortly after he left the Company by the Union because he hoped to be a foreman at the Company and was working toward that goal.

Collins stated emphatically that he was told by the Board agents that he had a duty to look for work and to report to the Board regarding his efforts and any income earned; Collins recalled receiving the work search report forms from the Board. However, Collins said that he could not recall where specifically he looked for work during the second quarter of 1998.

However, Collins said there was no time since his discharge that he did not look for employment except when he was hospitalized. He also noted that he received unemployment benefits from the state of Ohio which required him to make job searches at two to three employers in order to receive benefits. Collins stated that in addition, he went to various employers on his own during the period after he was discharged.

Collins said that he had no idea he had to keep all the records of his job search efforts, and, in fact, did not write down all the places he made inquiry. Collins said that he called the Union every week, sometimes twice in the same week, looking for work. Collins said that he also did day work through temporary employment services.[19]

James Roberts testified that he applied for a welding/shearer position being advertised by the Respondent around June 9, 1997. Roberts stated that he submitted as part of his application[20] a letter of reference from a previous employer, Sandusky Cabinets, Inc.,[21] which

[19] Collins conceded that he did not always completely fill out the Board expense search for work and interim earnings reports. See R. Exhs. 3(a)–(d), his forms submitted for parts of 1998 and 2000. Collins said that he considered his having filled out the work search forms for the Ohio unemployment authorities to be proper documentation of his good-faith efforts to secure work.

[20] Roberts' application is contained in G.C. Exh. 11.

[21] See G.C.Exh. 12(a).

included his having worked on the welding line and his resume[22] setting forth work experience with welding. Roberts said that he had experience with welding and shearing at Sandusky and later, when hired by the Respondent, was also a shearer operator.

Robert stated that after a time, his supervisor, Jeff Blake, assigned him to work with Collins fabricating oven panels, which job entailed welding and fabrication from blueprints.

Roberts stated he and Collins used 110 volt MIG welders because these machines operated at lower temperature suitable for the thin gauge metal used on the oven panels. Roberts noted that he, like Collins, was skilled in various types of welding and his work was praised by his supervisor, Blake.

Roberts stated that he had medical insurance coverage while employed at General Fabrications.

Robert said he was well aware of his obligation to look for work because the Board agents so instructed him. Roberts said that after his layoff, he immediately started "knocking on doors" of possible employers and the only time he was not looking for work was when he was actually working. Roberts acknowledged that he received payment from the Union for his joining the picket line that was set up after his discharge. According to Roberts, he was not sure of the period he received payment for picketing, but did not think he was required to picket in order to be paid. He felt that the Union was trying to help them out so he worked the picket line off and on. Roberts said he paid union dues during this time. He volunteered that he would not have crossed the picket line if he had not been laid off by the Company.

Roberts recalled the Board agents giving him work search forms and he completed them as best he could but, in any case, he worked whenever and wherever he could; for example, at the Jeep plant, AB Air and Durr, and contract work at a Ford dealership.[23]

Roberts said that he called the Union to check on the availability of work; sometimes the Union would call him. The Union on occasion did find work for him.

Roberts stated that he is currently employed by United Church Homes, an employer for whom he worked intermittently prior to and after his discharge from the Respondent.

The General Counsel also called Matt Oakes, an organizer for the Union. Oakes stated that Local 33 set up a picket line at the Respondent's facility around November 1997 and the unfair labor practice picketing continued for about 1 year. Oakes said that discriminatees Collins, Roberts, and Cloud were paid strike benefits by the Union essentially to help the men out in view of their having been illegally terminated around the holiday season in 1997. The Union felt they needed money for the holidays. The only requirement to receive the benefits was to be a dues-paying member of the Union; they did not have to picket to get the benefits.[24]

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[22] See G.C. Exh. 12 (b).

[23] Roberts identified R. Exhs. 4(a)–(d) as copies of the reports that he or his wife filled out. Roberts said that he did not write down all of his job contacts, especially April–June 2001; but Roberts named several companies on "whose doors he knocked" but are not reflected in the reports. He also referred to a company by name he visited in January through March 1999; Roberts said he was particularly interested in working for this company.

[24] Oakes said that other laid-off members, business agents, and even current employees of the Respondent were part of the picketing activities. Not all of these persons were paid. Oakes

Continued

Oakes said the Union tried to get work for the discriminatees. He noted that Cloud and Johnson were electricians for whom the Union did not have much in the way of calls for work. Oakes said the Union spoke to the electrician union locals about them to get interviews and into the appropriate electricians' local. Regarding Collins and Roberts, the Union put them on its out-of-work list and, when jobs were available, sent them out.

Oakes noted that at the time of their discharge—winter time—work was slow and unemployment among the locals was as high as 30 percent in some areas of the Union's jurisdiction.

Oakes described Cloud as a very aggressive, intelligent, and willing worker who wanted to enhance his learning. According to Oakes, Cloud, from the very time he was laid off, was contacting the Union to find him work; in Oakes' view, Cloud was a worker. According to Oakes, Collins was constantly on the Union to find him work. Oakes said that both Collins and Roberts hounded him for work. Oakes recalled one occasion when he received a call for welders needed in Minnesota, and Collins and Roberts, then working the picket line, immediately answered the call and together drove to Minnesota for the job. Oakes said that Collins and Roberts traveled to Toledo and worked in welding shops there, a distance entailing 1 to 1-1/2 hour in travel each way. Basically, Oakes stated that when there was a job and the Union called, these men responded and were always available to work.

The Respondent's Contentions; Conclusions

The Respondent first contends that an appropriate backpay formula should be based upon the hours and earnings of comparable employees and the specification should be modified to reflect those hours and earnings.

As noted, I have stricken the Respondent's response in its answer regarding this particular contention. Accordingly, I would reject his contention as grounds for rejecting the General Counsel's specification.

The Respondent next argues that claimants Collins, Roberts, and Cloud are not entitled to any backpay because there was no work available to them during the backpay period, given their qualifications.

The Respondent's argument here is bottomed on its view that Cloud was employed by the Company as an electrician's helper as opposed to electrician; and Collins and Roberts were employed, respectively, as laborer and oven panel builder as opposed to qualified welder fabricators. The Respondent submits that based on its own diminished business activity, the Company employed no one in either of these job classifications during the backpay period.

Regarding Cloud, Judge Carson determined in the underlying unfair labor practice case that Cloud was hired as an electrician's helper. The judge also determined that Cloud and the work he performed continued to be needed. Judge Carson noted that the Respondent, however, to cover its illegal action in laying him off "had to make various arrangements to assure that the work [he] would have performed was accomplished." Judge Carson also

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stated that the Union never asked participants not to cross the picket lines; in fact, current workers would picket on their lunch hours and then go back to work; others would picket before and after work. (Tr. 228-29.)

determined that the Respondent failed to recall Cloud because of his having engaged in union activity. To right this wrong, the judge ordered that Cloud be offered full reinstatement to his former jobs or, if that job no longer exists, to a substantially equivalent position.

The Respondent's records—summaries of employees being carried on its payroll as electricians for the backpay period—indicate that it had one electrician, discriminatee Fields, engaged in 1998; one in 1999, C. Campbell; one in 2000, R. Branhaim; none in 2001; none in 2002; one in 2003, D. Malloy; and one in 2004, D. Malloy.

First, the Respondent's own records, if they are to be credited, indicate that there was at least in some of the years a need for an employee who could do electrical work. Cloud credibly testified, in my view, that he could do electrical work of the type the Respondent's business entailed. Judge Carson, as I read his decision, evidently concluded that Cloud was qualified to do the necessary electrical work at the Respondent's facility. Accordingly, I would find and conclude that Cloud, irrespective of the job title he held—electrician's helper—was qualified to do electricians' work as it was performed at the Respondent's facility at the time of his illegal layoff. While the Respondent has argued that its business fell off, it has not argued that the nature of the business and the work performed by electrical workers changed during the backpay period. Also, considering what Judge Carson considered to be the lengths to which this Company would go to avoid unionism, I am not persuaded that the records adduced by the Company at the backpay hearing reflect a true record of the employees and the classifications they held during the backpay period. Notably, Judge Carson noted that the Respondent's "arrangements" to frustrate the Union cause included using supervisors and subcontractors to do the work of Cloud. I am not persuaded that there was no job/work at the Respondent's facility available during the backpay period that Cloud could not have performed in order to remedy the unlawful action against him.

Turning to Collins and Roberts, I am in similar vein not persuaded by the Respondent's claim that no work was available to them during the backpay period. Collins and Roberts credibly and with corroboration, in my view, established that they both were qualified welder/fabricators irrespective of the job titles under which they applied or for which they were hired. In their cases, clearly the Respondent's argument takes on more form than substance. Again, to the extent the Respondent's records can be credited as accurate and true, welder fabricators were employed by the Respondent during the backpay period. The Respondent was ordered to make them whole in part by returning the two to their former jobs or substantially equivalent ones. I would find and conclude that contrary to the Respondent's position, there were jobs which Collins and Roberts were qualified to perform available during the backpay period.

On balance, I would reject the Respondent's claim as to Cloud, Collins, and Roberts that no backpay is due them.

The Respondent next asserts that Collins and Roberts should be denied backpay for those periods in which they failed to seek work.

Collins and Roberts, as corroborated by Oakes, both convinced me that they made a satisfactory and good-faith attempt overall to mitigate damages in their search for work during the backpay period. One, as noted, the Board does not require perfection either in the attempt by discriminatees to obtain employment or in the keeping of records of their efforts. Both men convinced me that they both possessed a strong work ethic and honored their obligation to the best of their ability as they understood matters. On balance, I would find and conclude that

Collins and Roberts made an adequate search for work in each quarter covered by the specification.

The Respondent argues that Collins, Roberts, and Cloud each received strike benefits in 1997 and 1998, and that these amounts should be included as interim earnings in the compliance specification. The Respondent submits that it is clear that Collins and Roberts received $6,000 each from about December 3, 1997, through June 30, 1998; and Cloud received $200. In its view, the Respondent asserts that the three discriminatees understood that it was their duty to support the strike by picketing, and the Union supported the strike, pursued unfair labor practice charges, and helped them obtain interim employment. The Respondent argues that this is emblematic of an ongoing mutually beneficial business relationship, in short an employee-employer relationship.

In agreement with the General Counsel, I would find and conclude that the strike benefits were collateral to their union membership and were properly excluded from their interim earnings. I note that contrary to the Respondent, there was no clear understanding by any of the three discriminatees as to the basis for their receiving help from the Union after the layoff. Cloud clearly wanted to find employment, but not with the Union. In my view, he did not view his picketing as the quid pro quo for receiving the money from the Union.

Collins credibly testified that he was never told that he had to picket to get paid and understood he was getting a benefit as a union member on strike. Roberts credibly said that he felt the Union was simply trying to help them out, not demanding that they work as pickets in order to get paid.

Oakes for the Union credibly testified that the payments were made initially to help the discriminatees, what with the holiday season approaching. It seems clear that Oakes and the discriminatees themselves preferred that the discriminatees obtain regular jobs within their trades, and worked toward that end for the three as opposed to keeping the men on the picket line payroll. In my view, the strike benefits the three received were not earnings or wages that should have been included to offset the backpay calculations of the specification. The Respondent has not met its burden to show the payments constitute earnings. *ABC Automotive Products Corp.*, 319 NLRB 874 (1995); *Rice Lake Creamery Co.*, 151 NLRB 1113 (1965), enfd. as modified 365 F.2d 888 (D.C. Cir. 1966).

In my view, the specification, as amended, makes good sense and is entirely reasonable in the overall. The General Counsel, through the eminently credible testimony of Bednar, has established that the specification is a reasonable and rational approach to the make-whole remedy envisioned by the Board for these discriminatees.

I note that like most attempts at reconstructing or repairing situations that have passed into history, the specification is not perfect; but it is the best resolution for an imperfect process that took place over a fairly extensive period of time. I would specifically find and conclude that the Respondent has not demonstrated that its approach to the backpay award is the more reasonable and rational. In point of fact, the Respondent has not advanced even a credible alternative to the General Counsel's specification. Notably, the Respondent against all sense, reason, and law, has even suggested that certain discriminatees should be awarded nothing; for others, it seemingly takes no serious issue with the specification;[25] and for others still, the

[25] The Respondent evidently does not seriously dispute the specification calculations for Davin Jones, John Johnson, and Ron Fields. This is not surprising considering the relatively

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Respondent suggests reductions in nonspecific amounts. In agreement with the General Counsel, the Respondent's position on balance seems to be a mere disagreement with the specification devised after careful research and consideration by Bednar.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, General Fabrications Corp., Sandusky, Ohio, its officers, agents, successors and assigns, shall make the following discriminatees whole by paying them the amounts as set out below:[27]

Bryan Cloud	$36,476
Davin Jones	$27,765
Eddie Collins	$146,955
James Roberts	$113,958
John Johnson	$7,308
Ronald Fields	$7,391

Dated, Washington, D.C. June 20, 2005

Earl E. Shamwell Jr.
Administrative Law Judge

low backpay awards associated with them. While I would not find as such, there is a strong suspicion in my mind that the Respondent's opposition to the specification may be grounded in the dollar amounts awarded, not the substance of the specification.

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[27] I have found the specification herein to be a rational, fair, and reasonable approximation of backpay to which the discriminatees are entitled. However, there may be mathematical or transcription mistakes either on my part or the compliance officer. I would recommend as part of this Order that any purely mathematical or clerical errors contained in the specification be automatically corrected without further Order or action by me.